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11-30-00

IN THE UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF PENNSYLVANIA

CLEVELAND HANKERSON

Petitioner,

v.

CIV. NO. 1:CV-00-1836, USDC

CRIM. NO. 5:91-CR-10-MDGA

DONANLD ROMINE, WARDEN

Respondent.

/

FILED
SCRANTON
NOV 30 2000
PER
DEPUTY CLERK

REPLY TO THE GOVERNMENT'S RESPONSE TO PETITIONER'S MOTION UNDER 28, U.S.C. § 2241.

NOW COMES, the petitioner, Cleveland Hankerson, pro-se and in reply to the government's response to petitioner's § 2241 motion. In support thereof, states as follows:

Petitioner contends that the government's response to said pro-se §2241 motion is without merit and petitioner urges this court to grant petitioner the relief sought, for the reasons, facts, points and authorities set forth in his pro-se motion, "combined with this rebuttal".

Since petitioner is appearing pro-se, he is advised out of an abundance of caution that the denial of his pro-se motion and/or traverse at this stage would represent a final adjudication of this case, which may foreclose subsequent litigation on this matter. Griffith v. Wainwright, 772 F.2d 822 (11th Cir. 1985).

The Court in Griffith, also states "...it is accordingly important that pro-se notice be given as to insure (...) opportunity to present every factual and legal argument available." With that in mind, petitioner respectfully requests that this Court, while assessing petitioner's traverse, that this rebuttal be given due consideration and made part of the record, and held to "less stringents standards than formal pleadings drafted by lawyers". Haines v. Kerner, 404 U.S. 519 (1972).

Given the nature of petitioner's claims, petitioner finds it necessary to include a complete copy of the indictment attached hereto.

Petitioner was not informed of the essential elements comprising the charge 841(b)(1)(A), by way of indictment, and because there is a reasonable likelihood that each jury would base its verdict upon a valid indictment. The petitioner is actually innocence of the conviction of the uncharged 841(b)(1)(A).

JURISDICTION -

The failure of petitioner's indictment to allege the federal crime 841(b)(1)(A), of which he stands convicted of, and sentenced to a mandatory life term, cannot be cured by proof of the fact that the Grand Jury did not consider the quantity of drugs (841 (b)(1)(A)), as required by the Fifth Amendment. This constitutional right to be tried only on charges presented in an indictment returned by a Grand Jury, is not subject to harmless error analysis. Neder v. United States, 527 U.S. 1 (1999); United

States v. Prentiss, 206 F.3d 960 (10th Cir. 2000); United States v. Macklin, 523 F.2d 193 (2nd Cir. 1975) ("The absense of an indictment is a jurisdictional defect which deprives the court of its power to act"). Id.

In making the requirement of an indictment jurisdictional, Rule 7(a) what always considered to be law. Thus, In Ex Parte Wilson, 114 U.S. 417 (1885), the court stated that "the district court, in holding the petitioner to answer for such a crime... without indictment or presentment by a Grand Jury, exceeded its jurisdiction, and he is therefore entitled to be discharged." (Emphasis added).

Similarly, Ex Parte Bain, 121 U.S. 1 (1887), the defendant was convicted of an indictment found invalid because it had been amended by the court. The court held that "the jurisdiction of the offense is gone" because the case not "properly presented by indictment". Id. at 13 (emphasis added).

Lack of subject matter jurisdiction may be raised at anytime, because if a court lacks subject matter jurisdiction, it does not have power to hear the case. Article III, Section 2 of the Constitution. Banker Ramo Corp. v. United Business Forms Inc., 713 F.2d 1272 (7th Cir. 1983). As stated in Federal Rules of Criminal Procedure, 12 (b)(2), if an indictment "fails to show jurisdiction in the court or to charge an offense, [such] objection shall be noticed by the court at any time during the pendency of the proceeding." United States v. Adesida, 129 F. 3d 846 (6th Cir. 1997). If an indictment does not charge a cognizable federal offense, then a federal court lacks jurisdiction

to try a defendant for violation of the offense. United States v. Armstrong, 951 F.2d 626 (5th Cir. 1992).

ACTUAL INNOCENCE -

To establish actual innocence, a defendant must establish that in light of all the evidence, it is more likely than not, no reasonable juror would have convicted him. Schulp v. Delo, 513 U.S. 298 (1995). A defendant must show — at the threshold — both a constitutional violation and a colorable showing of actual innocence. Pack v. Reynolds, 958 F.2d 989 (10th Cir. 1992).

Here, there is no doubt that petitioner Hankerson was convicted of the criminal conspiracy charged in the indictment, Count one violating, 21, U.S.C. 846 and 21, U.S.C. 845(b) and Count two violating, 21, U.S.C. 841(a)(1) and 18, U.S.C. 2. There is no argument from petitioner to the contrary. The narrow issue to this particular claim, is whether petitioner is actually innocent to just 21, U.S.C. 846, 845(b), 841(a)(1) and 18, U.S.C. 2. "but" of 21, U.S.C. 841(b)(1)(A) as defined by the Controlled Substance Act. That determination must be made by a jury based upon a valid indictment. Lockett v. Puckett, 988 F. Supp. at 1029; Apprendi v. New Jersey, 120 S.Ct. 2384 (2000).

Accordingly, because petitioner's indictment is missing essential elements, i.e., (841(b)(1)(A)) to the crime he stands convicted and sentenced of, no reasonable juror could have convicted him based on the allegations of his indictment to the crime he

stands convicted today, that is violating 21, U.S.C. 841(b)(1)(A). Nor, can the government rebut or present any admissible evidence of petitioner's guilt that would overcome the government's failure to charge all the elements of the crime they were seeking to prosecute. Therefore, petitioner is actually innocent of the conviction and sentence under the uncharged 21, U.S.C. 841(b)(1)(A).

THE PETITIONER WAS NOT CHARGED BY THE GRAND JURY AS TO THE (b) PORTION OF TITLE 21, U.S.C. § 841, BUT WAS SENTENCED AND CONVICTED UNDER THE (b) PORTION OF § 841

The indictment clause of the Fifth Amendment requires that **an indictment contain some amount of factual particularity** to ensure that the prosecution will not fill in elements of its case with facts other than those considered by the Grand Jury. United States v. Crowley, 79 F. Supp. 2d 138 (E.D.N.Y. 1999).

Crowley, has an analogous fact pattern to the instant case, where the defendant argued that the indictment handed down by the Grand Jury failed to satisfy the Fifth Amendment requirement. Because the indictment was silent as to which of the four sexual acts set forth in the statute he was alleged to have attempted to commit.

As Crowley puts it, his argument is simple:

> "The indictment is silent on the essential question of what he in fact was being said to have done, and thus no one knows what the grand jury in fact thought he did. In other words,

> what on earth did our grand jury mean when it charged a 'sexual act'?...There is simply no way we can be sure what the grand jury meant by a 'sexual act' when its indictment is silent on the question." Id., see footnote 11. ("I think it is important to make sure this isn't a question of adequacy to notice to the defendant so he could prepare for trial. The vice that is involved here is the failure to comply with the Fifth Amendment requirement that a felony prosecution is based on a grand jury indictment").

Here, the petitioner was charged with violating the "controlled Substance Act". As in Crowley, the indictment is silent as to which of the four controlled substance acts they conspired to commit. Failure of the indictment to specify alleged controlled substance act violated the defendant's grand jury rights under the Fifth Amendment.

Here, the language of the indictment is too general, the indictment is silent on the **essential facts** of the case. The indictment must allege essential facts necessary to apprise a defendant of the crime he is charged with. United States v. Musacchio, 940 F.2d 486 (9th Cir. 1991).

For example, if the indictment alleged that the petitioner possessed a measurable amount of cocaine or cocaine base, this is such a case. Then after conviction, sentence the petitioner 5 grams or more of cocaine or cocaine base, would violate the holding in Kotteakos v. United States, 328 U.S. 750 (proof of a

crime not charged in the indictment). Because the Fifth Amendment guarantees a defendant the right to be tried on only those offenses presented in an indictment returned by a grand jury. Stirone v. United States, 361 U.S. 212 (1960).

The Fifth and Sixth Amendments set-forth bedrock principles of constitutional law:

> "No person shall be held to answer for a capital or prosecution or indictment of a grand jury", U.S. Const. Amend. V., and "[I]n all criminal prosecutions, the accused shall enjoy the right...to be informed of the nature and cause of the accusation." U.S. Const. Amend. VI. These principles are enshrined in Fed. R. Crim. P. 7(c), which states that "[T]he indictment...shall be a plain, concise and definite written statement of the **essential facts** constituting the offense charged." Crowley, 79 F.Supp. 2d at 153.

This court held that fidelity to this rule is required in order to safeguard a defendant's constitutional rights. Complinace with Rule 7(c):

> "Fulfills the Sixth Amendment right to be informed of the nature and cause of the accusation; it prevents a person from being subject to double jeopardy as required by the Fifth Amendment; and it serves the Fifth Amendment protection against prosecution for crime based on evidence not presented to the grand jury."

See, United States v. Silverman, 430 F.2d 106 (2d. Cir. 1970)

(Analyzing sufficiency of the indictment to "insure that the defendant [was] not tried upon a theory or evidence which was not fairly embraced in the facts upon which the grand jury based its charges"), modified, 439 F.2d 1198 (2d Cir. 1970.

The petitioner contends that the indictment handed down by the grand jury fails to satisfy the Fifth Amendment requirement, because the indictment was silent as to which actual quantity of the four controlled substance acts set forth in the statute he was alleged to have conspired to commit. See, 21 U.S.C. § 841(b)(penalties).

Here, the charging language of the indictment was ambiguous regarding the conspiratorial objectives each of the defendants was alleged to have participated in. The ambiguity was not resolved throughout the trial and was not cleared up when the jury returned its "general verdict" as to the conspiracy count.

There is simply no way of knowing from the charging language which of the four conspiratorial objectives the grand jury alleged the petitioner was involved in. For example, did the grand jury allege petitioner solely agreed to possess 0 to 5 grams of cocaine base, solely agreed to possess 5 grams or more, solely agreed to possess 1.5 kilograms or more?

In view of these differences, the indictment clearly fails to allege sufficient facts to facilitate the proper preparation of defense and to ensure that the defendant was prosecuted on facts presented to the grand jury. "The indictment clause of the Fifth Amendment 'requires that an indictment contain **some amount of factual particularity** to ensure that the prosecution

will fill in elements of its case with the facts other than those considered by the grand jury." United States v. Abrams, 539 F.Supp. 378 (S.D.N.Y.).

Here, there is no doubt that the "quantity" of controlled substance is the most essential element of the crime conspiracy and distribute under 21, U.S.C. §§846 and 841. Indeed, without any quantity of controlled substance, there is no crime under these two sections of the statute. The core of criminality under these sections is the actual type and weight of controlled substances involved. Of which has four separate sub-sections that give a totally different minimum and maximum penalties, (depending upon the actual type and weight of substance the defendant possessed or conspired to distribute). See, 21, U.S.C. § 841 (b). The term "Penalties" under 841(b) is an umbrella phrase, its panels protecting against at least four different species of unlawful acts. It is a generic term that can change dramatically with each indictment. See, Hamling, 418 U.S. at 118-

Given the variety of ways in which this statute could be violated, the conduct alleged to comprise the charged controlled substance violation, that is, the quantity must be delineated in the indictment. See, 1 Wright, Federal Practice and Procedure § 125 (1982) (If the statute charges a variety of possible offenses, a pleading in the statutory language that does not indicate which offenses defendants' are alleged to have committed is insufficient, and if the statute is couched in general terms, the indictment must particularize the offense").

This court cannot say with any degree of certainty that

the defendant's convictions were obtained by the use of evidence that first was presented to the grand jury. This lack of certainty stems from a comparison of what is charged in the indictment — a singular "controlled substance violation" — and the proof presented at trial of four distinct quantities of controlled substance violations. Under these circumstances, this court cannot be certain that the government did not, impermissibly "fill in element of its case" with facts not presented to the grand jury. Therefore, petitioner's conviction must be vacated.

CONCLUSION

To indict petitioner Hankerson for violating 21, U.S.C. 846, 845(b), and 841(a)(1), which has no criminal penalty —— then at the conclusion of his trial —— if found convicted —— sentence him pursuant to subsection 841 (b)(1), under one of its several available sentencing prerequisites does not provide fair notice and offends the due process clause of the Constitution's Fifth Amendment.

In Harris v. United States, _____F.Supp. 2d_____, 2000 WL 1641073 (D.N.J., filed Nov. 1, 2000), the court ruled that 28, U.S.C. § 2241 is the proper remedy where a petitioner seeks to challenge his conviction based on the rule announced in Apprendi, where the gatekeeping provisions for filing a successive § 2255 motion bar the filing of a successive § 2255 motion. This is precisely what the petitioner in the instant case seeks to do.

For the foregoing reasons, petitioner respectfully requests that this court grant his § 2241 motion.

Respectfully submitted,

Cleveland Hankerson

Dated: November 22, 2000

Cleveland Hankerson
Reg. No. 83507-020
USP Lewisburg
P.O.Box 1000
Lewisburg, Pa. 17837

cc:nl

CERTIFICATE OF SERVICE

I, MR. CLEVELAND HANKERSON, hereby certify, under the penalty of perjury, that I have mailed a true copy of the foregoing document(s) to those listed below at the address listed with the proper amount of first class postage prepaid by placing same in the institutional legal mailbox at the United States Penitentiary at Lewisburg, Pennsylvania this 22th day of NOV., 2000.

This same day I have mailed in the same way an original and 1 copies of the foregoing documents(s) to the Clerk of the Court.

MR. MICHAEL T. SOLIS
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IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

		SECOND SUPERSEDING INDICTMENT
UNITED STATES OF AMERICA	:	CRIM. NO. 91-10 MAC (WDO)
	:	
vs.	:	VIOLATIONS: 21 U.S.C. § 846
	:	i/c/w
JAMES EDWARD COLBERT, a/k/a	:	21 U.S.C. § 841(a)(1)
"JAY",	:	
JIMMY BERNARD BARKLEY, a/k/a	:	21 U.S.C. § 841(a)(1)
"J.B.",	:	18 U.S.C. § 2
TROY LEE BROWN, and	:	
CLEVELAND HANKERSON, a/k/a	:	18 U.S.C. § 924(c)
"HANK"	:	18 U.S.C. § 2
	:	
		18 U.S.C. § 922(g)(1)

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THE GRAND JURY CHARGES:

COUNT ONE

That beginning October 1, 1990 and continuing until November 8, 1990, in the Macon Division of the Middle District of Georgia,

JAMES EDWARD COLBERT, a/k/a "JAY",
JIMMY BERNARD BARKLEY, a/k/a "J.B.",
TROY LEE BROWN, and
CLEVELAND HANKERSON, a/k/a "HANK"

did unlawfully and willfully conspire with each other and with other persons, both known and unknown to the Grand Jury, knowingly and intentionally to possess with intent to distribute a Schedule II controlled substance, to-wit: a mixture and substance containing a detectable amount of cocaine, that is cocaine base; and did knowingly and intentionally employ, hire, use, persuade, induce, and entice JOSEPH MAURICE MEREDITH, GREG

STATEN and RODNEY DWAYNE PERSON, all individuals who were under eighteen (18) years of age, all in violation of Title 21, United States Code, Section 846, in connection with, Title 21, United States Code, Section 845b.

COUNT TWO

That on or about November 1, 1990, in the Macon Division of the Middle District of Georgia,

JAMES EDWARD COLBERT, a/k/a "JAY",
JIMMY BERNARD BARKLEY, a/k/a "J.B.",
TROY LEE BROWN, and
CLEVELAND HANKERSON, a/k/a "HANK"

aided and abetted by each other and by other persons, both known and unknown to the Grand Jury, did unlawfully, knowingly, and intentionally possess with intent to distribute a Schedule II controlled substance, to-wit: a mixture and substance containing a detectable amount of cocaine, that is cocaine base; all in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT THREE

That between October 1, 1990 and November 7, 1990, in the Macon Division of the Middle District of Georgia,

JAMES EDWARD COLBERT, a/k/a "JAY",
JIMMY BERNARD BARKLEY, a/k/a "J.B.",
TROY LEE BROWN, a/k/a, and
CLEVELAND HANKERSON, a/k/a "HANK"

aided and abetted by each other and by other persons, both known and unknown to the Grand Jury, during and in relation to a drug trafficking crime for which they may be prosecuted in a court of the United States, to-wit: the offenses set forth in Counts One and Two of this Indictment, did use and carry firearms, to-wit: one Plainfield, Enforcer Model, .30 caliber pistol, serial number PP00106; all in violation of 18 U.S.C. § 924(c)(1) and 18 U.S.C. § 2.

COUNT FOUR

That on or about October 31, 1990, in the Macon Division of the Middle District of Georgia,

JAMES EDWARD COLBERT a/k/a "JAY"

having been convicted July 19, 1989, in the Circuit Court, Fifteenth Judicial Circuit, Palm Beach County, Florida, Indictment #88-12662 CFA for Grand Theft Auto, a crime punishable by imprisonment for a term exceeding one year, did knowingly receive and possess firearms which had previously been shipped and transported in interstate commerce, to-wit: a Plainfield Enforcer Model, .30 caliber pistol, serial number PP00106; in violation of 18 U.S.C. § 922(g)(1).

COUNT FIVE

That on or about October 31, 1990, in the Macon Division of the Middle District of Georgia,

CLEVELAND HANKERSON a/k/a "HANK"

having been convicted March 6, 1989, in the Circuit Court, Fifteenth Judicial Circuit, Palm Beach County, Florida,

Indictment #88-5735 CF for Possession of Cocaine with intent to sell and Possession of Marihuana with intent to sell, crimes punishable by imprisonment for a term exceeding one year, did knowingly receive and possess firearms which had previously been shipped and transported in interstate commerce, to-wit: a Plainfield Enforcer Model, .30 caliber pistol, serial number PP00106; in violation of 18 U.S.C. § 922(g)(1).

A TRUE BILL.

FOREMAN OF THE GRAND JURY

Presented By:

MICHAEL T. SOLIS
ASSISTANT UNITED STATES ATTORNEY

FORM OBD-34
SEP 1978

No. _____

UNITED STATES DISTRICT COURT

MIDDLE District of GEORGIA

MACON Division

THE UNITED STATES OF AMERICA

vs.

JAMES EDWARD COLBERT, ET AL

INDICTMENT

VIOLATIONS:
21 U.S.C. § 846 i/c/w 21 U.S.C. § 841(a)(1)
21 U.S.C. § 841(a)(1)
18 U.S.C. § 2
18 U.S.C. § 924(c); 18 U.S.C. §2
18 U.S.C. § 922 (g)(1)

A true bill.

_____ Foreman.

Filed in open court this 31st *day*

of October *A.D. 19* 91

_____ Clerk.

Deputy

Bail, $ _____

GPO 863 525